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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

JENNY C.,

Petitioner,

v.

THE SUPERIOR COURT OF MADERA
COUNTY,

Respondent;

MADERA COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Real Party in Interest.

F071394

(Super. Ct. No. MJP017447)

OPINION

THE COURT*

ORIGINAL PROCEEDING; petition for extraordinary writ review. Thomas L. Bender, Judge.

Richard A. Ciummo & Associates and Lusine M. Vardanova for Petitioner.

No appearance for Respondent.

Regina Garza, County Counsel, and Miranda P. Neal, Deputy County Counsel, for Real Party in Interest.

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* Before Levy, Acting P. J., Kane, J. and Poochigian, J.

Jenny C. seeks extraordinary writ relief from the juvenile court's order setting a Welfare and Institutions Code section 366.26 hearing¹ as to her 11-month-old daughter A.R. Jenny contends there was insufficient evidence to support the juvenile court's jurisdictional finding under section 300, subdivision (g) (failure to provide support) that she was unable to arrange for A.R.'s care while she (Jenny) was incarcerated. Jenny further contends there was insufficient evidence to support the juvenile court's dispositional order removing A.R. from her custody. We grant the petition.

PROCEDURAL AND FACTUAL SUMMARY

In December 2014, Marcelina H., a friend of Jenny's, presented then five-month-old A.R. to the staff at the Madera County Department of Social Services (department). Marcelina explained that Jenny was arrested and placed A.R. in her care approximately two weeks before. She was prepared to file for legal guardianship but Jenny's sisters harassed and threatened her and demanded that she turn the baby over to them. Marcelina was unwilling to place her family in danger and decided to relinquish A.R. to the department.

A social worker visited Jenny at the county jail. Jenny said she was arrested for theft and assault with a deadly weapon. She explained that a friend spent all of her welfare money and she needed to find work to buy diapers for A.R. Another friend offered her \$20 to steal a bicycle from someone's porch. She stole the bicycle but the owners caught her and called the police who found a knife on her. She denied using drugs or alcohol during her pregnancy and said she did not have a support system.

The department filed a dependency petition on A.R.'s behalf, alleging one count under section 300, subdivision (g). The juvenile court ordered A.R. detained and the department placed her in foster care.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

In its jurisdictional report, the department reported that in 2002, the juvenile court adjudged Jenny's two sons dependents of the court and denied her reunification services under section 361.5, subdivision (e)(1).² Her parental rights as to one son were terminated and the other was reunited with his father.

The department also reported that a social worker spoke with Marcelina and told her the department would support her if it placed A.R. with her. Marcelina agreed to pursue placement of A.R.

In January 2015, Jenny appeared in custody represented by her attorney at the jurisdictional hearing. Her attorney submitted the matter on the department's report and Jenny waived her right to a contested hearing. The juvenile court found a factual basis for sustaining the petition and adjudged A.R. a dependent child under section 300, subdivision (g). The single count under subdivision (g) alleged,

“[A.R.] has been left without any provision for support as her parent, [Jenny], is incarcerated and is unable to arrange for the care of [A.R.]. Upon her incarceration, [Jenny] left [A.R.] in the care of her friend, [Marcelina], who is no longer willing to provide care and support for [A.R.].”

The court set the dispositional hearing for the end of January 2015.

On January 29, 2015, the department completed its report for the dispositional hearing. It reported that A.R. was living with a foster family. The department further reported that it explored emergency placement with Marcelina but her boyfriend had a criminal history preventing placement. On January 20, 2015, Marcelina attended the relative home approval orientation and had been active in submitting the required documentation to the department. By mid-February 2015, the department was prepared

² Section 361.5, subdivision (e)(1) authorizes the juvenile court to deny an incarcerated parent reunification services if the court finds by clear and convincing evidence those services would be detrimental to the child.

to approve Marcelina for placement, but was waiting for information from the court in regard to Marcelina's boyfriend's criminal matter.

The department also reported that Social Worker Esperanza Ramos spoke to the maternal aunt who also wanted to be considered for placement. The aunt supported A.R.'s placement with Marcelina but would take her if Marcelina could not.

The department recommended the juvenile court deny Jenny reunification services under section 361.5, subdivision (b)(11) because her parental rights to her son were terminated and, as in A.R.'s case, she was incarcerated and unable to arrange for her sons' care. It also recommended denial of services under section 361.5, subdivision (b)(12) because Jenny was convicted of a violent felony (carjacking) in 2002 and sentenced to three years in prison.

The dispositional hearing was continued and conducted as a contested hearing in April 2015. Ramos testified that A.R. was placed with Marcelina, the same family friend with whom A.R. was residing prior to coming into foster care. Jenny testified that it was her decision to place A.R. with Marcelina and that she notarized some documents in that regard. She expected to be released in July 2015.

At the conclusion of the hearing, the juvenile court ruled that the department failed to meet its burden under section 361.5, subdivision (b)(11), but denied Jenny reunification services under section 361.5, subdivision (b)(12) and set a section 366.26 hearing.

This petition ensued.

DISCUSSION

Section 300 provides in pertinent part that "Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court: [¶] ... [¶] (g) ... the child's parent has been incarcerated ... and cannot arrange for the care of the child"

Jenny contends there was insufficient evidence to support a factual finding that she could not arrange for A.R.'s care while she was incarcerated. Therefore, there was no basis for the juvenile court to take jurisdiction under subdivision (g) of section 300.

On review, we determine whether substantial evidence supports the juvenile court's jurisdictional finding. In this case, we conclude that it does not. We find *In re S.D.* (2002) 99 Cal.App.4th 1068 (*S.D.*) instructive on this issue.

In *S.D.*, the parents left their two-year-old son with a relative in their hotel room while they went out to dinner. The innkeeper realized that the parents were using a stolen credit card and called the police. The police arrested the relative and took the child into protective custody after discovering that the relative had an outstanding arrest warrant. The mother was arrested the next day. The social services agency (SSA) filed a dependency petition alleging the mother was incarcerated and neither parent was available to care for the minor, but there was no allegation or any evidence that the mother was unable to arrange for the child's care during her incarceration. In fact, the mother had several options for her child's care. (*S.D.*, *supra*, 99 Cal.App.4th at pp. 1071-1072.) The child was briefly placed with a maternal aunt after the detention hearing and again after the 12-month review hearing. (*Id.* at pp. 1072-1073, 1075-1076.) The juvenile court exercised its jurisdiction solely on the section 300, subdivision (g) allegation. (*S.D.*, *supra*, 99 Cal.App.4th at p. 1074.)

The *S.D.* court concluded that the SSA failed to properly plead and prove the section 300, subdivision (g) count and reversed the juvenile court's judgment. (*S.D.*, *supra*, 99 Cal.App.4th at pp. 1083-1084.) In doing so, the court set forth principles underlying the statute that directly bear on this case. First, it held that if at the time of the jurisdictional hearing the parent could arrange for the child's care during the period of incarceration, the juvenile court had no basis to take jurisdiction. (*Id.* at pp. 1077-1078.) Further, even if the SSA and not the parent made the specific arrangements, "the obvious inference is that it was through [the parent's] contacts, and not pure chance, that SSA was

able to get in touch with that [careprovider].” (*Id.* at p. 1078.) “Nothing in section 300, subdivision (g),” the court stated, “requires an incarcerated parent ... to prove affirmatively the suitability of her caretaking arrangements.” (*Id.* at p. 1079.)

Here, Jenny arranged for A.R.’s care during her incarceration by placing her with Marcelina who was prepared to assume legal guardianship. In all likelihood, the department would have not become involved in this case had Jenny’s sisters not interfered. Nevertheless, the department succeeded in getting Marcelina to reconsider taking custody of A.R. by assuring Marcelina that it would support her, including assisting her in dealing with Jenny’s sisters. Thus, even though A.R. was in foster care at the time of the jurisdictional hearing, Marcelina was actively seeking placement of her with the assistance of the department. Further, just because the department had to step in to clear the way for A.R.’s placement with Marcelina, it does not mean that Jenny was unable to arrange for A.R.’s care. Jenny made the initial contact with Marcelina that ultimately resulted in A.R.’s successful placement. On such evidence, the juvenile court could not find that Jenny was unable to arrange care for A.R.

Real party contends this court should affirm the juvenile court’s section 300, subdivision (g) finding because Marcelina’s act of relinquishing A.R. to the department was “*res ipsa loquitur*” of Jenny’s inability to make suitable arrangements for A.R. We have already addressed the suitability issue to some degree. As we stated, the question was whether Jenny was able to arrange for A.R.’s care during her incarceration. The problem was not that Marcelina was unsuitable. On the contrary, she was willing to commit to caring for A.R. through a legal guardianship. In addition, she was ultimately approved for placement. Rather, the problem was Jenny’s sisters’ opposition to A.R.’s placement with Marcelina which the department helped Jenny resolve.

Real party further contends, without explaining the significance, that Jenny never objected to the juvenile court’s jurisdictional finding. To the extent real party argues Jenny waived her right to challenge the jurisdictional finding by submitting on the

department's report, it is mistaken. A parent who submits on the report is merely agreeing to the court's consideration of such information as the only evidence in the matter. (*In re Richard K.* (1994) 25 Cal.App.4th 580, 589.) A parent who submits on the department's recommendation however endorses the recommended findings and orders and waives his or her right to challenge it. (*Ibid.*) While Jenny submitted on the report, she did not submit on the recommendation. Therefore, she did not waive the issue for our review.

We conclude the juvenile court's jurisdictional finding under section 300, subdivision (g) is not supported by substantial evidence. Having so concluded, we need not review the juvenile court's dispositional orders removing A.R. from Jenny's custody and denying Jenny reunification services under section 361.5, subdivision (b)(12), for without jurisdiction the juvenile court cannot make dispositional orders. (§ 358.)

We must therefore remand this case to the juvenile court. We do so recognizing that circumstances may have changed since the juvenile court issued the finding and orders we now vacate. We thus instruct the juvenile court accordingly.

DISPOSITION

The petition for extraordinary writ is granted. Let an extraordinary writ issue directing respondent court to vacate its jurisdictional finding under section 300, subdivision (g) as to A.R. and its orders removing A.R. from petitioner's custody, denying petitioner reunification services under section 361.5, subdivision (b)(12), and setting a section 366.26 hearing. Respondent court is further directed to conduct a new hearing to determine whether there is a basis for amending the petition to plead, and then prove that petitioner is unavailable to take custody of A.R. because of petitioner's incarceration and that petitioner is unable to arrange for A.R.'s care. If the department can plead and prove those facts now, there is a basis for yet sustaining this petition. However, if petitioner is now available and willing to assume care of A.R. or incarcerated

and able to make arrangements to provide care for A.R. during petitioner's incarceration, then the petition must ultimately be dismissed.

This opinion is final forthwith as to this court.